APPENDIX

MEMORANDUM OPINION

This is an action for personal injuries brought by plaintiff, John Pinkowski, against Ralph Coglay, d/b/a Mohawk Equipment Company (hereinafter referred to as Coglay); Fred Keefe; and A. B. Arthur and A. J. Nelson, d/b/a Arnel Trading (hereinafter referred to as Arnel).

Plaintiff's complaint charges that his injuries resulted from Keefe's negligent handling of a heavy box of fish during unloading operations; that the box struck plaintiff's left leg and ultimately resulted in an amputation. The complaint further alleges that Keefe was, at the time of the occurrence, the agent of Arnel, or in the alternative that all the defendants were engaged in a joint venture at the time the plaintiff was injured.

There is no dispute that Keefe was negligent. In fact, prior to trial plaintiff moved for summary judgment against Keefe on the issue of liability, which the Court granted. Thereafter, the case proceeded to trial against all the defendants on the remaining issues. On the second day of trial, Keefe and Arnel (represented by the same counsel) entered into a Covenant Not To Sue with plaintiff and his wife, Elfreda Pinkowski, and thereupon these defendants were dismissed from the suit.

The case proceeded against Coglay. His liability was submitted to the jury who found the issues in favor of plaintiff and returned a verdict against him in the sum of $75,000.00.

In the post-trial motion, Coglay prays for judgment N.O.V. or in the alternative that a remittitur of $45,000.00 be entered against the judgment rendered against him, which is the sum that plaintiff and his wife received from

Keefe and Arnel by way of the Covenant. He does not seek a new trial.

The Court will first consider the motion for judgment N.O.V. In passing on such a motion, the Court must consider the testimony in the light most favorable to plaintiff, resolve all conflicts in the plaintiff's favor, and give plaintiff the benefit of every fact which may reasonably be deduced from the evidence, Delaware and H. R. Corp. v. Bonzik, 105 F. 2d 341. This rule prevails in Illinois. As stated in Hulke v. International Manufacturing Company, 13 Ill. App. 2d 571, 142 N.E. 2d 717:

> "On motion for judgment notwithstanding the verdict, or for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the plaintiff; and it is only where there is no evidence tending to prove plaintiff's case that the court can grant either a motion for directed verdict, or judgment, notwithstanding the verdict. Lindroth v. Walgreen Co., 407 Ill. 121, 130, 94 N.E. 2d 847; Beverly v. Central Illinois Elec. & Gas Co. . . ."

The following salient facts appear in the record. It is undisputed that on the date of the occurrence in question, Arnel was engaged in the interstate sale of fish. At the behest of Coglay, Keefe approached Arnel to enter into an undertaking whereby Coglay would furnish his tractor, Keefe the labor and Arnel the trailer. The equipment was used not only to transport fish in interstate commerce for Arnel, who was the only defendant with an I.C.C. permit, but also to pick up and deliver other goods from which Keefe and Coglay derived profit. In the Arnel deliveries, Keefe received $250 for his services on each trip and, by agreement of all parties, Coglay received an identical amount from Arnel.

Pursuant to his arrangements with Coglay, Keefe:

> " . . . would work the truck and tell him (Coglay) what revenue the truck had made, and we would arrive at a satisfactory split of the money between Mohawk and myself, and I would get my wages, paid my own taxes, and so forth."

Keefe's testimony describes the relationship of all of the defendants in a vein suggestive of a three-way joint enterprise. He testified:

> "I was satisfied to continue with that (arrangement) because I felt it was easier on me than hauling steel. Coglay was satisfied with that. He was paying his notes and even if he weren't getting rich he was at least building some equity in his truck. Arnel was satisfied, the fish were being delivered and everyone was getting along fine."

It has long been settled in Illinois that a joint enterprise may be established wherever there is a common interest in the subject matter of a journey, Grub v. Illinois Terminal Company, 366 Ill. 330. In Grub, there was no sharing of profits as a result of a joint endeavor, as in this case. Nevertheless, the Supreme Court of Illinois stated that:

> "When a journey in which the occupants, including the driver of the vehicle, are participating, is, itself, a part of a business enterprise in which the parties are mutually interested, they are engaged in a joint enterprise, and it is immaterial that the particular journey is a single transaction and is not a part of a general course of business in which they are associated as partners or otherwise; that it is also immaterial whether the automobile is owned or hired by one or the other or by them jointly, and that the use of the automobile, as a part of the common business enterprise, makes each responsible for the manner in which it is operated."

The use of an Interstate Commerce Commission certificate by one member of a joint enterprise has in itself been held to create a liability upon another who makes use of the interstate franchise to conduct business. In Louis v. Youngren, 12 Ill. App. 2d 198, 138 N.E. 2nd 696, the plaintiff was struck from behind by a truck engaged in Interstate Commerce and driven by the alleged lessee. The plaintiff brought suit against the owner as well. The owner contended that he was not liable because he maintained no control over the driver. In rejecting this argument, the Court said:

> "Sims may not escape its responsibility to the public by hiring an independent carrier to haul under Sims' permit from the Commerce Commission. Venuto v. Robinson, 3 Cir., 188 F. 2d 679; Hodges v. Johnson, D.C. 53 F. Supp. 488. This rule is noted in 'Restatement of the Law of Torts,' page 1149, Section 428, as follows:
>
> 'An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity.' The rule is also supported by the Illinois cases. Ohio & Mississippi Railroad Co. v. Dunbar, 20 Ill. 623; Boyd v. Chicago & N. W. Ry. Co., 217 Ill. 332, 336-337, 75 N.E. 496; Orange v. Pitcairn, 280 Ill. App. 566, 572. We agree with the statement in the Venuto case, 118 F. 2d 679, 682, that truck travel upon the highways is attended with 'very considerable risk' and comes within the meaning of the rule."

Coglay further argues that Keefe cannot be the agent of both defendants. This point is not well taken. It is the established law of Illinois that more than one person may be responsible for the acts of the agent or servant.

Yankey v. Oscar Bohlin & Son, Inc., 37 Ill. App. 2d 457, 186 N.E. 2d 57. Such rule pertains not only to general principles of agency, but in the determination of an employer's status when injuries have been sustained by the alleged employee in proceedings under the Workmen's Compensation Law. American Stevedores Company v. Industrial Commission, 408 Ill. 445; companion case 408 Ill. 449; Hudson v. Industrial Commission, 387 Ill. 228 at 239; Krawiec v. Industrial Commission, 372 Ill. 560 at 566.

This Court does not agree that the points thus urged relieve the defendant Coglay of responsibility for Keefe's tortious act as a matter of law. There was evidence that the operation was entrusted to Keefe, that he was clothed with authority to solicit business for the mutual account of both, and that there were regular accountings between them. From these facts the jury could reasonably infer that Keefe was either the agent of Coglay or that all the defendants were engaged in a joint venture. It is not the province of the Court to disturb a jury verdict when, as in the case at bar, it is supported by ample evidence. The Court, and the parties as well, are much more concerned with the other question which had been presented, namely the effect of the Covenant.

(The rest of the opinion is not related to the questions presented here.)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14741

JOHN PINKOWSKI,
Plaintiff-Appellee,

v.

RALPH COGLAY, doing business as MOHAWK EQUIPMENT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MAY 24, 1965

Before HASTINGS, *Chief Judge,* CASTLE and SWYGERT, *Circuit Judges.*

HASTINGS, *Chief Judge.* This diversity action was brought by plaintiff John Pinkowski against defendants, A. B. Arthur and A. J. Nelson, doing business as Arnel Trading (Arnel), Ralph Coglay, doing business as Mohawk Equipment Company (Mohawk) and Fred Keefe.

Plaintiff's complaint alleged he was injured as a result of Keefe's negligence and that Keefe was an agent of Arnel and Mohawk or, in the alternative, that defendants were engaged in a joint venture. Plaintiff sought recovery of damages for his alleged injuries.

Approximately three months prior to the injury complained of, Mohawk leased a truck tractor to Arnel. Keefe executed this lease on behalf of Mohawk.

On December 4, 1959, at Boston, Massachusetts, fish were loaded by Arnel onto a truck trailer owned by Arnel. The tractor leased by Mohawk to Arnel was itched to this loaded trailer. Keefe drove the unit to Chicago for delivery to Halfpap & Company (Halfpap).

On December 7, Keefe unloaded the fish at Halfpap and was assisted by plaintiff, an employee of Halfpap. A box of fish being moved by Keefe slipped causing it to strike another box which fell and struck plaintiff's left leg.

Plaintiff had previously injured this leg. In August, 1960 after the above-mentioned accident, the leg was amputated. The cause of the amputation was contested at the trial but is not before us on appeal.

As stated, plaintiff filed suit against Keefe, Arnel and Mohawk. Prior to trial, plaintiff moved for summary judgment against Keefe on the issue of liability. The district court granted this motion. On the second day of trial, Keefe and Arnel entered into a written covenant not to sue with plaintiff and his wife and paid them $45,000. Keefe and Arnel were dismissed from the suit.

A jury verdict was returned in favor of plaintiff and against Mohawk in the amount of $75,000 and judgment was entered thereon.

Mohawk moved for judgment notwithstanding the verdict or, in the alternative, for a remittitur of $45,000. The district court in a memorandum opinion denied Mohawk's motions holding that, "From these facts the jury could reasonably infer that Keefe was either the agent of * * * [Mohawk] or that all the defendants were engaged in a joint venture" and that Mohawk was not entitled to a remittitur. Mohawk appealed.

The principal issues presented on appeal are whether Mohawk is liable to plaintiff because Keefe was Mohawk's agent in unloading the fish or because defendants were engaged in a joint venture; or, in the alternative, whether the $75,000 judgment against Mohawk should be reduced by the $45,000 payment made by Keefe and Arnel to plaintiff and his wife pursuant to the covenant not to sue.

In considering the district court's denial of Mohawk's motion for judgment n.o.v., we must consider the evidence in the light most favorable to plaintiff.

Both parties cite the Illinois case of *Carroll* v. *Caldwell*, 12 Ill. 2d 487, 147 N.E. 2d 69 (1958) for a definition of a joint venture, which is as follows:

> "It is pointed out in 30 Am. Jur., Joint Adventures, sec. 30, that courts have not laid down an exact definition of what amounts to a joint adventure inasmuch as the answer depends largely upon the terms of the particular agreement, upon the construction which the parties have given it, and upon the nature of the undertaking as well as other facts. The most that can be done, it is said, is to point out certain general characteristics of the relationship of joint adventurers, and certain elements which are generally regarded as essential thereto. Accordingly, it can be said that a joint adventure contemplates an enterprise jointly undertaken; that it is an association of such joint undertakers to carry out a single project for profit; that *there must be a community of interest in the performance of a common purpose, a proprietary interest in the subject matter, a right to direct and govern the policy in connection therewith, and a duty, which may be altered by agreement, to share both in profit and losses.* (*Hagerman* v. *Schulte*, 349 Ill. 11; *Harmon* v. *Martin*, 395 Ill. 595; *Harris* v. *Young*, 298 Ill. 319, 23 I.L.P. Joint Adventures, 48 C.J.S., Joint Adventures, 30 Am. Jur., Joint Adventures, 80 A.L.R. 1037; 138 A.L.R. 955). The same authorities, together with *Berkey* v. *Third Ave. Railway Co.*, 244 N.Y. 84, 155 N.E. 58 and *Gleichman* v. *Famous Players-Lasky Corp.*, 241 Mich. 266, 217 N.W. 43, establish that the relationship is a matter of intent, as between the parties, and arises only where they intended to so associate themselves, such intention being determined in accordance with the ordinary rules governing the interpretation and construction of contracts." (Emphasis added.) *Id.* at 496-497, 147 N.E. 2d at 74.

Indispensable elements of a joint venture in Illinois appear to be an association of two or more persons to carry out a single enterprise with a legitimate purpose, a community of interest in such purpose, expectation of profits and the sharing thereof and the right of each person to direct and govern the conduct of each other person. See *ibid.* and 23 Illinois Law and Practice, *Joint Adventures,* pp. 59-65 (1956) and cases cited therein.

The following facts in the instant case appear to be undisputed.

Mohawk owned the tractor in question and desired to keep it operating and earning money in order to pay money owed on the tractor. Mohawk (by Coglay) contacted Keefe (a truck driver) and asked Keefe if he could keep "my truck busy * * * and bring me in revenue to pay the bills and make yourself a living in the bargain?"

Keefe began driving Mohawk's tractor and hauled various items, including steel. The threat of a steel strike caused Keefe to negotiate with Arnel and, as agent for Mohawk, to enter into a written exclusive lease with Arnel whereby the tractor was leased to Arnel beginning September 18, 1959. It was verbally agreed that Keefe would drive the tractor.

Keefe began driving a "standard run" which left Boston every Friday night with a load of fish to be delivered to Halfpap in Chicago on Monday morning.

The name "Arnel Trading" was painted on both sides of the tractor in September, 1959. Arnel agreed to pay $250 for the run between Boston and Chicago and another $250 if a load of Arnel's was hauled from Chicago to Boston. Keefe and Mohawk divided this income equally. Thus, if Arnel paid $500 for a round trip, Keefe and Mohawk each received $250. Keefe paid for fuel, tolls and other expenses out of his $250. Repairs to the tractor were paid by Mohawk. No money was withheld from Keefe's $250 for income tax purposes. The tractor was never used by another carrier while under the exclusive lease arrangement with Arnel.

The following facts demonstrate that Mohawk had no control over or connection with the delivery of fish: the fish were loaded onto the truck trailer in Boston by Arnel; the bills of lading for the fish were in the name of Arnel; Keefe filled out logs which he gave to Arnel; Arnel receipts were signed by consignees for the fish; Keefe made collections on behalf of Arnel; and the destination of the tractor-trailer unit and the date and time of arrival were determined by Arnel.

Following the delivery of the fish to Chicago, Arnel would direct Keefe concerning the items, usually wool, to be picked up for the return trip to Boston.

Applying these facts to the law above set out, we hold, as a matter of law, that Keefe; Arnel and Mohawk were not engaged in a joint venture in transporting and unloading the fish. There was no community of interest, sharing of profits or right of Mohawk to direct and govern the conduct of Keefe in the delivery of the fish.

The district court and plaintiff quote and rely upon the following testimony of Keefe as demonstrating a community of interest:

> "I [Keefe] was satisfied to continue with him because I felt it would be *easier on me than hauling steel.* Coglay [Mohawk] was satisfied with that, he was *paying his notes,* and even if he wasn't getting rich he was at least building some equity in the truck. Arnel was satisfied. *The fish then was being delivered* and everyone was going along fine." (Emphasis added.)

In our opinion, this statement clearly shows a divergence of interests.

The district court in its memorandum opinion states that in Illinois there is no requirement that profits be shared in order to establish a joint venture, citing *Grubb* v. *Illinois Terminal Co.,* 366 Ill. 330, 8 N.E. 2d 934 (1937). The fact situation and legal concept involved in that case

are inapposite from those in the instant case. In *Grubb,* plaintiff was an occupant in an automobile which ran into the side of defendant's electric train. Plaintiff and the driver of the car were sharing expenses of a trip to Springfield, Illinois for the purpose of obtaining material to decorate their home. The issue involved was whether the negligence of the driver could be imputed to plaintiff. This was to be determined by whether plaintiff was a guest in the car or whether plaintiff and the driver were engaged in a joint enterprise. The latter would invoke "the rule that when two or more persons are engaged in a joint enterprise or undertaking in the use of an automobile, the contributory negligence of one will bar recovery by either, where the claimed damage arises out of a matter within the scope of a joint undertaking." *Id.* at 338, 8 N.E. 2d at 938.

The legal concept of joint adventure involved in the instant case is a business arrangement similar to a partnership. "While a joint adventure is not identical with a partnership, practically the only distinction is that a joint adventure relates to a singe specific enterprise or transaction and a partnership relates to a general business of a particular kind * * *." 23 Illinois Law and Practice, Joint Adventures, §2, p. 61 (1956). "The expectation of a profit and the sharing thereof are * * * indispensable elements." *Id.* § 1, p. 60.

We further hold there was no issue of fact for the jury concerning whether Keefe was an agent of Mohawk in the delivery and unloading of the fish.

Keefe and Arnel, in their amended answer, admitted that Keefe was an agent for Arnel in unloading the trailer. Of course, this does not mean that Keefe could not also have been an agent for Mohawk in the unloading. *Yankey* v. *Oscar Bohlin & Son, Inc.,* 37 Ill. App. 2d 457, 186 N.E. 2d 57 (1962).

The fact that Keefe was the agent of Mohawk in negotiating and entering into the exclusive lease agreement

with Arnel does not create an inference that Keefe was an agent of Mohawk in unloading the fish. 1 Illinois Law and Practice, *Agency* § 124, p. 759 (1956).

We find no evidence in the record from which the jury could reasonably find that Keefe was Mohawk's appointed or implied agent in delivering and unloading the fish, or that Mohawk was estopped from denying that Keefe was its agent.

In sum, we hold, as a matter of law, that Mohawk was not engaged in a joint venture with Keefe and Arnel and that Keefe was not Mohawk's agent. The district court erred in refusing to grant Mohawk's motion for judgment n.o.v.

The judgment is reversed and the case is remanded to the district court for entry of judgment in favor of Mohawk and against plaintiff.

REVERSED AND REMANDED.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60610

Monday, May 24, 1965

Before

Hon. JOHN S. HASTINGS, *Chief Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

JOHN PINKOWSKI,
Plaintiff-Appellee,
v.
RALPH COGLAY, doing business as MOHAWK EQUIPMENT COMPANY,
Defendant-Appellant.

No. 14741

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and that this cause be and it is hereby, REMANDED to the said District Court for entry of judgment in favor of Mohawk Equipment Company and against plaintiff, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Chicago, Illinois 60610

Thursday, July 8, 1965

Before

Hon. JOHN S. HASTINGS, *Chief Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

JOHN PINKOWSKI,
Plaintiff-Appellee,
v.
RALPH COGLAY, doing business as MOHAWK EQUIPMENT COMPANY,
Defendant-Appellant.

No. 14741

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause, filed by the appellee herein, be, and the same is hereby DENIED.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

JOHN PINKOWSKI, Petitioner

v.

RALPH COGLAY, ETC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause, be, and the same is hereby, extended to and including Nov. 5th, 1965

/s/ TOM C. CLARK
Associate Justice of the Supreme Court of the United States

Dated this 5th
day of October, 1965

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

JOHN PINKOWSKI, Petitioner

vs.

RALPH COGLAY, doing business as MOHAWK EQUIPMENT COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 20th, 1965.

/s/ TOM C. CLARK
Associate Justice of the Supreme Court of the United States

Dated this 4th
day of November, 1965

CONSTITUTION OF THE UNITED STATES AMENDMENT VII

In Suits at common law, where the value and controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.